DOCUMENT RESUME

ED 427 469 EC 307 039

TITLE	Diverting Public Funds: The Misguided Mission of the Independent Living Center of Amsterdam, Inc.
INSTITUTION	New York State Commission on Quality of Care for the Mentally Disabled, Albany.
PUB DATE	1998-08-00
NOTE	47p.
AVAILABLE FROM	Commission Publications, NYS Commission on Quality of Care for the Mentally Disabled, 99 Washington Ave., Suite 1002, Albany, NY 12210-2895; toll-free telephone (voice/TDD): 800-624-4143; telephone: 518-473-7538; Web site: http://www.cqc.state.ny.us.
PUB TYPE	Reports - Evaluative (142)
EDRS PRICE	EDRS Price MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	Adults; Audits (Verification); *Compliance (Legal); Financial Audits; Fraud; *Independent Living; *Mental Retardation; *Residential Programs; State Standards
IDENTIFIERS	*Medicaid

ABSTRACT

This report presents findings of an investigation by the New York State Commission on Quality of Care for the Mentally Disabled into the programmatic and financial practices of the Independent Living Center of Amsterdam (ILC/A), a New York institution which receives two-thirds of its monies from Medicaid to provide services to individuals with developmental disabilities. Specifically, the investigation found that the ILC/A: (1) illegally used Medicaid and state contract monies to fund a retirement community corporation (Veddersburg Village), which it then mismanaged; (2) exceeded its corporate authority in developing Veddersberg and violated the State Education Law, which bars housing programs; (3) misled state contract agencies by assuring them that no government monies would be used to develop Veddersburg, while overcharging a state contract for $58,000; (4) solicited "donations" from consumers transported by its vehicles, despite receiving public funds to pay for such transportation, in violation of law; and (5) received over $45,000 in Family Support Service contract funds for services to underserved individuals with developmental disabilities, despite having no such clients. The report begins with an overview of the Independent Living Centers, offers background information, and then reports Commission findings concerning Veddersburg Village, agency transportation services, Project Lead, agency cost allegations, program review, and regulatory implications. Recommendations and responses by the New York State Office of Vocational and Educational Services for Individuals with Disabilities are also included. Attachments include relevant letters. (DB)

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DIVERTING PUBLIC FUNDS:

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New York State Commission on Quality of Care
for the Mentally Disabled

August 1998

EC 307039

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DIVERTING PUBLIC FUNDS:

THE MISGUIDED MISSION OF THE INDEPENDENT LIVING CENTER OF AMSTERDAM, INC.

Gary O'Brien
CHAIR

Elizabeth W. Stack
William P. Benjamin
COMMISSIONERS

AUGUST 1998

NYS COMMISSION
ON QUALITY OF CARE
FOR THE MENTALLY DISABLED

PREFACE

New York State provides funding to a network of 35 not-for-profit service centers known as Independent Living Centers [ILC], whose mission is to assist individuals with disabilities to become integrated with and live more independently in their community. By law, the majority of the members of the ILC boards of directors must be persons with a disability. The ILC's are funded, evaluated and overseen by the New York State Office of Vocational and Educational Services for Individuals with Disabilities (VESID). While the corporate mission of these centers is very broadly and generally defined, one thing is very clear– ILC's are expressly prohibited by state law from establishing or operating any kind of residential or housing facility.

The Independent Living Center of Amsterdam, Inc. (ILC/A) is unique among ILC's in that it receives two-thirds of its monies from Medicaid to provide services to individuals with developmental disabilities. These services include supervision and program support for developmentally disabled individuals in family care homes certified by the New York State Office of Mental Retardation and Developmental Disabilities (OMRDD). Additionally, despite the state prohibition against operating residential or housing facilities, the Commission discovered that ILC/A improperly established and operated a retirement community for middle and upper income senior citizens through a closely held not-for-profit corporation called Veddersburg, Inc. (Veddersburg).

ILC/A and Veddersburg have an interrelationship that can hardly be called independent. Indeed, the mutuality of their operation includes, interlocking boards of directors and shared employees who were being paid by one corporation while doing work for the other.

Although ILC/A asserts that its Veddersburg operation is justified on the basis that all elderly can be considered "disabled," such a definition is inconsistent with federal and state law, and certainly common sense. Therefore, ILC/A's control over the Veddersburg corporation for this purpose is inconsistent, not only with its own corporate purpose, but also possibly violates federal and state law.

A significant finding of this Commission is that these corporations, through ILC/A's inappropriate and inefficient use of Medicaid monies, were able to establish and operate Veddersburg which now threatens the investments of elderly citizens. Equally significant is the inappropriate and potentially illegal way ILC/A has operated Veddersburg. As this report goes to press in August 1998, Veddersburg precariously teeters on the verge of bankruptcy. Its two residential units are occupied by individuals who are likely unaware that the corporation is in such fiscal jeopardy and financially unable to fulfill its obligations to them, which include substantial refunds they have a right to demand under their contracts.

Finally, the required "offering plan" (a report disclosing the project and its terms) filed with the New York State Department of Law, also was apparently violated. The violations concerned a requirement that there exists a minimum level of resident commitments before the project could proceed, terms that would ensure greater fiscal responsibility and stability for Veddersburg and protections to its residents.

FINDINGS

Family Care Homes

- The Commission visited five of the ten family care homes sponsored by ILC/A. It found positive interactions between the clients and their care givers, who tended to client needs in a caring and respectful manner. While most of the homes afforded their residents a clean, sanitary, and personalized environment, one home was found to have substandard environmental conditions. (pp. 9-10)

- Only about 50 percent of family care monies go to the operators of these homes for actual services. The remaining half of the money is retained by ILC/A for administration and clinical support of the program. At ILC/A, these funds generated a substantial surplus which was diverted, misapplied and ultimately wasted in developing a senior citizen retirement community, which itself now jeopardizes the substantial investments of elderly citizens. (pp. 9-10, Attachment B)

Retirement Community – Operation of Veddersburg

- ILC/A's development of the Veddersburg retirement community and its mismanagement has drained both agencies of substantial assets. This has not only placed ILC/A's core programs in jeopardy, but also has placed at risk the $40,000-$60,000 entrance fees of current elderly Veddersburg residents. (pp. 3-6)

- The development and operation of the retirement community by ILC/A is beyond its corporate authority and is expressly barred under the New York State Education Law. Moreover, ILC/A's use of medical assistance monies and state contract monies for this project appears to violate federal and state laws intended to safeguard and restrict the use of such monies from misuse or misappropriation. (pp. 1, 4, 11)

- OMRDD and VESID were misled by ILC/A officials and its legal representative who represented that no government monies would be used to develop the Veddersburg project. Additionally, cost reports filed with OMRDD also failed to disclose the related party relationship between ILC/A and Veddersburg. (pp. 10-11, Attachments A and B)

Transportation Services

- ILC/A has been soliciting "donations" from consumers being transported in its vehicles, even though the agency has been receiving public funds to purchase the vehicles and pay for the operating costs. This is of questionable legality under the Medicaid program and state regulation (pp. 6-7)

- ILC/A was "double-dipping" by improperly billing Medicaid for transportation services to cover the costs already being paid through OMRDD and VESID funding sources. (p. 7)

- A van funded under an OMRDD grant for specialized transportation services for developmentally disabled consumers was rarely used for this purpose. (pp. 7-8)

Family Support Service (FSS) Contracts

- ILC/A received $45,197 in FSS funds from OMRDD over a period of several years to provide advocacy and to coordinate services for underserved individuals with developmental disabilities. Until recently, there were literally no individuals in the program because of competition from programs run by other providers. Rather than serving persons with developmental disabilities, ILC/A diverted these funds to serve consumers covered by its VESID contract. (p. 8)

Agency Cost Allocations

- Even though Veddersburg benefits greatly from administrative and accounting support provided by ILC/A, no costs ever have been allocated to this project. Instead, the VESID contract has been overcharged about $58,000 for administrative costs. Costs were similarly misstated on OMRDD costs reports which are used to monitor agency expenditures and to establish reimbursement rates. (pp. 8-9)

CONCLUSION AND REFERRALS

Fundamentally, ILC/A, like other ILC's, is supposed to be an operation that assists individuals with disabilities to pursue a more independent and active life in the community. However, ILC/A was neither authorized to operate residential housing, nor to depart from the terms of the contract for funds it received from the state. Yet, it did deviate by establishing an affiliated housing corporation, then using staff and monies it received from public sources to operate a corporation which was neither disability related nor in conformance with the requirements of its offering plan filed with the New York State Department of Law. Furthermore, ILC/A and its legal representative deceived OMRDD and VESID officials by assuring them that no government funding was being used for the project. This occurred at the same time that ILC/A actively sought an increase to its budget from the state to improve services.

Based on our review, it is clear that OMRDD and VESID believe there are unmet needs of persons with disabilities within the Amsterdam area. Yet, it is equally clear to this Commission that ILC/A's actions improperly diverted funds which should have been used to benefit persons with disabilities, rather than to fund an ill-conceived residential facility for elderly citizens who are not necessarily disabled. This raises very serious questions about the actions of ILC/A's board of directors, who have a fiduciary duty to see that the corporation behaves honestly and properly.

At ILC/A, it appears that the board members failed to act as fiduciaries in caring for its property and managing its affairs, and the executive director violated her position of trust within the organization. The board of directors has fundamental obligations to sufficiently understand the purpose of the organization, oversee its executive director, and assure that it operates honestly and consistently within its public purpose. This was not being done: the ILC/A board brokered the establishment of a retirement community even though independent living centers are specifically barred under the New York State Education Law from developing and operating housing facilities; ILC/A knowingly and intentionally misapplied federal assistance monies under its custody and control, a potential violation of Title 18, United States Code, Section 666(a) (1) (A); and, the boards of Veddersburg and ILC/A were derelict in their duty under the State Not-For-Profit Corporation Law, which requires when there is common management/directors there must be equity and

candor in the transactions between corporations and some reasonable proportion between the benefits and burdens.

In this case, the interests of two not-for-profits were not safeguarded and programs were placed at risk because their boards' scrutiny of the transactions was at least careless. The financial conditions of two corporations were allowed to deteriorate to a point where financial insolvency is now a distinct possibility. Moreover, Veddersburg by accepting entrance fees of $40,000 and $60,000 from two residents before the required number of lease agreements were executed--and thus a sufficient and stable fund would exist for operation – will likely place these consumers at risk when they seek to obtain the up to 75 percent refunds they were promised.

Consequently, because of the current, precarious financial position of ILC/A and Veddersburg, Inc., and because Veddersburg continues to solicit new residents for its housing program, the Commission makes the following recommendations to:

OMRDD and VESID:

- enforce the requirement that all ILC/A ties to the Veddersburg project be terminated. Serious consideration should be given to transferring ILC/A programs/services to other agencies with proven track records of service and integrity;

- seek recovery of OMRDD and VESID contract/grant overpayments from ILC/A and/or its principals as part of the close-out plan for this facility.

The New York State Department of Law:

- require Veddersburg to stop all sales of future units until the 15 percent commitment level on resident participation has been met. Allow the current Veddersburg residents to rescind their written residency agreements and to seek refund of all of their entrance fees from ILC/A and Veddersburg and/or their principals since the Veddersburg offering plan had not been declared "effective" when their entrance fees were remitted (Attachment E).

The Commission has referred a draft copy of this report to the Office of Mental Retardation and Developmental Disabilities and the Office of Vocational and Educational Services for Individuals with Disabilities. Modifications were made to the final report where appropriate. Their respective responses are appended to this report. A draft was also reviewed by ILC/A. Specific responses or comments from ILC/A are included in pertinent sections of the body of the report.

In response to the findings of this report, both OMRDD and VESID have taken affirmative steps to correct the problems noted in the Commission's report (See letter to ILC/A, Attachments C and D). The respective state agencies also have taken a closer look at their internal monitoring mechanisms and will adopt changes or become more attentive to situations leading to financial instability.

Pursuant to its statute, the Commission intends to refer the findings of its review to the following agencies for follow-up action within the scope of their jurisdiction: the Department of

Law, Charities Bureau; Department of Law, Medicaid Fraud Control Unit; and, the United States Attorney for the Northern District of New York.

The findings, conclusions, and recommendations contained in this report represent the unanimous opinions of members of the Commission.

Gary D. O'Brien
Chair

Elizabeth W. Stack
COMMISSIONER

William P. Benjamin
COMMISSIONER

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INTRODUCTION

INDEPENDENT LIVING CENTERS

In order to assist New York's citizens with disabilities to integrate and live more independently in the community, the State Legislature provides funding to not-for-profit organizations known as "Service Centers for Independent Living." In New York State, there are 35 predominately consumer-run, non-residential not-for-profit centers designed to assist physically and mentally disabled individuals. According to the New York Education Law §1121.1(iii), the purpose of these centers is to assist persons with disabilities in obtaining housing, employment referral, transportation referral, attendant care, independent living skills, advocacy, health care, home maker and other services which are approved by the Commissioner of Education. However, such centers, while community based, "shall not be established or operated as a residential or housing facility" (Education Law §1121.2). The authority and responsibility for administering these programs is through the Office of Vocational and Educational Services for Individuals with Disabilities (VESID).

The Independent Living Center of Amsterdam, Inc. (ILC/A), located at 12 Chestnut Street, Amsterdam, New York, was incorporated as a not-for-profit corporation on May 25, 1988. According to ILC/A's Certificate of Incorporation, its purpose is to promote equality, independence and access for those who have disabilities through the provision of services, assistance, education, advocacy and guidance to individuals and to the community. Additionally, ILC/A was incorporated to promote self-awareness, community awareness and a better understanding of disability in order to achieve an environment free of physical and attitudinal barriers. Consistent with the Education Law §1121.2 restriction, there is no provision in the agency's corporate charter to establish or operate residential facilities.

In fulfillment of its corporate purposes, ILC/A has been operating several programs for individuals with physical and developmental disabilities. These include: Project Rainbow — an agency-sponsored Medicaid-funded family care home program licensed by the Office of Mental Retardation and Developmental Disabilities (OMRDD) for 17 individuals[1]; Project LEAD — a family support services contract funded by OMRDD to provide a variety of services to developmentally disabled persons living at home with their families; a VESID funded program — core services including counseling, advocacy, independent living skills training, and other training. The agency also offers several other smaller programs, such as transportation, and Comprehensive Medicaid Case Management for OMRDD clients living at home or elsewhere in the community.

In September 1995, ILC/A entered into a new venture to develop and manage a housing complex for seniors through an affiliated not-for-profit corporation called Veddersburg, Inc. According to its Certificate of Incorporation, the entity was formed to construct, maintain and operate housing facilities or a housing complex for the use and occupancy by aged persons. Acting as its management agent, ILC/A would provide support services to the retirement community with transportation, housekeeping, security services, and social activities included in the rent.

For the fiscal years ending June 30, 1996 and 1997, ILC/A's total revenue was $648,213, and $618,338, respectively. In these respective years, over 97 and 93 percent of this funding came from OMRDD and VESID contract funding sources. Medicaid funding accounted for almost two-thirds of the agency's revenues during these time periods.

[1] As a sponsoring agency, ILC/A is responsible for ensuring treatment and supportive services for family care homes (e.g., arranging respite, providing training to family care operators, and monitoring services). The family care home is a combination of a private residence and an adult individual who is certified by OMRDD to operate the home.

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BACKGROUND AND SCOPE OF REVIEW

The Commission's review of ILC/A began in the summer of 1997 after a referral from the Department of Law, Medicaid Fraud Control Unit (MFCU), which had received a complaint alleging program and fiscal abuse at this agency. Because of the Commission's knowledge of and expertise in program and fiscal oversight of not-for-profit corporations and its knowledge of how the OMRDD system operates, the MFCU referred several of these allegations to the Commission, while retaining responsibility for review of allegations involving Medicaid billing practices.

The Commission looked at the conditions of the family care homes and issues concerning possible financial abuse against the not-for-profit corporation and state funding agencies. MFCU sought to examine whether there were fraudulent billings to the Medicaid program.

The Commission's financial review generally covered the period January 1, 1995 to June 30, 1997. The Commission examined the agency's spending practices and its claiming procedures under the various state contracts. Additionally, the Commission reviewed the spending practices of Veddersburg Inc. for the period September 20, 1995 to June 30, 1997. The Commission's quality assurance staff visited five of the ten OMRDD licensed family care homes which the agency oversees.

Throughout the course of these reviews, the senior executives of ILC/A were courteous and responsive to the Commission's requests for information. Additionally, the agency made available the services of its independent accountant who provided supplemental financial data to help assure the accuracy of this report and its conclusions.

COMMISSION FINDINGS

1. VEDDERSBURG VILLAGE

On September 20, 1995, a Certificate of Incorporation was approved under the New York Not-For-Profit Corporation Law §402 (hereinafter, N-PCL) creating an entity called Veddersburg Inc., for the purpose of constructing, maintaining and operating a housing facility or complex for use and occupancy by aged persons capable of caring for themselves without the provision of long-term health services. The sponsors and initial directors of this corporation were all members of the board or employees of ILC/A. According to ILC/A board minutes, one of the main purposes of establishing this corporation was to enable ILC/A "to be creative and look to other sources of funding, rather than rely solely on State and Federal subsidies."

On April 21, 1997, the *Capital District Business Review* reported that ILC/A planned to build a $7 million, 59-unit senior living complex in Amsterdam called Veddersburg Village. The project was planned as an independent living complex for seniors with transportation, housekeeping, security services and social activities included in the rent. It would consist of a 36-unit apartment building and 11 cottages with two or three units each. According to an "offering plan" submitted to the NYS Department of Law,[2] ILC/A was to receive an annual fee to manage the retirement community. This included supervising the work of the executive director, assistance in the development of business operations, selection and installation of operating procedures, and the development of community policies. The Commission has found, however, as detailed below, that instead of becoming an additional funding source for ILC/A, Veddersburg has drained the agency of substantial public assistance funds, placing ILC/A's core programs at risk.

ILC/A board minutes state that Veddersburg is not intended for "everyone — it is *not* subsidized housing!" Instead, Veddersburg targets middle income seniors who don't have a great deal of money but "may have some savings including their home," and upper income seniors. In order to become a resident of Veddersburg, individuals are charged an entrance fee and monthly service fee pursuant to a residency agreement. Veddersburg's offering plan proposed that residents in cottages will be charged an entrance fee of $60,000; apartment entrance fees range from $41,000 to $47,000.[3] These entrance fees, however, were not to have been collected until "written agreements have been executed, delivered and accepted by the sponsor" for 15 percent (four cottages) or more of the overall units leased. In addition to the entrance fee, residents are also required to pay a monthly rent of either $1,125 for cottages or $1,025 for apartments. Veddersburg completed construction on one cottage in 1996 consisting of two units: one unit is leased and the other unit is being used as a model apartment. A second cottage (consisting of two more units) was completed in 1998 and one unit is leased. The respective entrance fees for the two rented units were $40,000 and $60,000.

Despite the laudable objective of establishing a retirement complex, the Commission has serious concerns about ILC/A's use of medical assistance and state contract monies for the purpose of developing a private senior housing development.

The N-PCL §508 requires all "incidental profits" (i.e., surpluses) to be applied to the maintenance, expansion, or operation of the lawful activities of the corporation. Consistent with the statutory restriction,

[2]Due to the highly risky nature of retirement communities, New York Law requires the disclosure and filing of an offering plan with the NYS Department of Law prior to leasing or offering to lease any unit in a retirement community.

[3]Residents are entitled to a refund of a portion of the entrance fee equal to the full fee diminished at the rate of one percent per month up to 25 percent at which time Veddersburg is obligated to refund 75 percent of the entrance fee without future reduction.

VESID officials told Commission staff of its policy that any surplus funds should be used to enhance or expand current services of the agency. Similarly, because of the non-arm's-length relationship between ILC/A and Veddersburg, there was a concern that ILC/A might be in violation of Education Law § 1121(2) which prohibits independent living centers from operating residential or housing facilities and whether public funds were used by ILC/A for this project. When VESID inquired about these concerns, ILC/A represented both verbally and in writing that no government funds were being used.[4]

The following are essential facts that should be considered in determining whether ILC/A's actions are appropriate:

- ILC/A's active and controlling role in developing, funding and managing a retirement complex is not enumerated as one of its corporate purposes in its Certificate of Incorporation. Yet, although a separate corporation, Veddersburg is a membership corporation with ILC/A as its **sole member**. Additionally, since its inception, Veddersburg has been operated as an affiliate of ILC/A, i.e., ILC/A and Veddersburg have had interlocking corporate officers and directors;[5] Veddersburg has received a significant portion of its start-up capital and operating funds from ILC/A; employees funded through Medicaid and VESID contract funds are used to maintain the Veddersburg properties; all administrative and accounting functions of Veddersburg have been handled by ILC/A administrative personnel; and, a press account in the *Capital District Business Review* on April 21, 1997 announced that Independent Living Center for Amsterdam (not Veddersburg) planned to construct and operate a $7 million retirement complex. Veddersburg's first cottage (two units), including architectural and other development charges, cost about $340,000 to construct, maintain and operate since it was opened in 1996. A second cottage (two units) costing$160,000 was opened in May 1998. A significant share of the funding for the first cottage came from ILC/A in the form of an interest-free loan. Since 1995, ILC/A has loaned Veddersburg approximately $136,000 or 40 percent of the initial project cost. The remaining funds have mainly come from Veddersburg securing a

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[4] On April 17, 1998, ILC/A's board president and executive director submitted a 21-page response letter to a draft of this report. Because of the length of the response, it is not appended to the Commission's public report as are the responses from the regulatory agencies that oversee ILC/A.

Significant portions of ILC/A's letter attempt to defend its actions with respect to the r: ment community project claiming *inter alia* that ILC/A's sponsorship is consistent with its corporate mission since the elderly as a group may fit the definition of disabled; the IRS granted separate tax-exempt status for Veddersburg, Inc.; the Department of Law "accepted for filing" the Veddersburg offering plan disclosing the project details; and, because it has "never withheld information with respect to its involvement in Veddersburg Village."

The Commission, however, finds that ILC/A's response does not address the Commission's finding that service centers for independent living are barred under the Education Law from establishing and operating housing facilities (*see also*, Attachment A, VESID Response to Commission Report). Moreover, ILC/A in its reply confirms that only Medicaid monies were used to develop this project. Yet, no reference is made to the Commission's finding that such use of Medicaid funds is illegal pursuant to 18 USC 666(a)(1)(A) which prohibits the conversion or intentional misapplication of federal funds.

Additionally, ILC/A has falsely represented to VESID (Attachment A) that the "development of the Veddersburg project is not being funded in any way shape or form by the budget of the Independent Living Center...[t]here is no government funding of the project...there is no government money being used to fund the Veddersburg project." Similarly, OMRDD's response letter (Attachment B) states that "the Executive Director of ILC/A represented that, no OMRDD funds have been used for this project" and that "[a]ssurances were given that no OMRDD supplied resources would be committed to the project in the future."

[5] Since Veddersburg's inception, Bonnie Page had been the executive director of both agencies. Initially, Veddersburg had five board members, all of whom were also on ILC/A's nine member board. In late 1997, only two of the seven members of Veddersburg's board were also members of ILC/A's board. On May 29, 1998, Ms. Page tended her resignation from ILC/A effective July 3, 1998.

$147,000 mortgage on the properties, a $43,500 loan from Lupe Development Company and rental income from one resident. The financing for the second cottage came primarily from a $148,000 mortgage and a portion of the second resident's entrance fee.[6] In September 1995, when the project was in its infancy, ILC/A entered into an agreement with the Lupe Development Company, Inc. whereby each entity would share equally in the development and operational costs of Veddersburg. However, in October 1996, the Lupe Development Company backed out of its part of the agreement, leaving ILC/A with the responsibility for funding almost all of the costs from that point forward.[7] Consequently, ILC/A diverted a substantial portion of its assets to this project, which more properly should have been applied to enhance its current services.

- ILC/A's decision to divert funds to Veddersburg has had a detrimental effect on its own finances. For the fiscal year ending June 30, 1997, a period when ILC/A advanced Veddersburg $77,000 interest-free,[8] the agency had to borrow $30,000 from its own line of credit at an interest rate of 10.5 percent to maintain its operations. These loans have also placed ILC/A in a precarious cash position. Prior to starting Veddersburg, ILC/A had approximately 30 days cash on hand to meet operating expenses. At the end of June 1997, ILC/A only had five days of cash on hand to meet expenses. As of May 1998, ILC/A had only 2.5 days of cash on hand to meet operating expenses and has had to increase the amount borrowed from its line of credit to $62,000. Thus, rather than acting to preserve its assets and further the purpose of this not-for-profit corporation (i.e., to serve dependent populations), funds have been advanced as a form of venture capital to develop programs that are not part of its corporate purpose.

- Lastly, although the ILC/A loan was intended to be short-term, whether it ever gets repaid is questionable because of the way Veddersburg is to be financed. According to its offering plan and financial projections, all outstanding loans will be paid back using a combination of commercial financing and resident entrance fees. In other words, ILC/A's loan will not be repaid until Veddersburg begins construction and obtains both the commercial financing and resident entrance fees. However, its offering plan also states that residents are entitled to a refund of a portion of their entrance fee subject to certain conditions. Veddersburg's

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[6] ILC/A has no secured interest in these properties other than a subvention agreement for $146,037 as of April 30, 1998, which under law (N-PCL §504) would be subordinate to the rights of general creditors (e.g., mortgagors) of the Veddersburg corporation.

[7] Until the Veddersburg's offering plan was accepted by the Attorney General's office on August 26, 1997, the retirement community received rental income from its one resident totaling $10,200 which was used to help defray the costs of operating Veddersburg.

[8] ILC/'s response letter reasons that N-PCL §508 allows a not-for-profit corporation to make an incidental profit which can be used to maintain or expand the lawful purposes of the corporation and that providing accessible housing is consistent with its mission. It points out that loaning funds to another Type B (i.e., charitable) organization is permitted pursuant N-PCL §716 and argues that both corporations have independent boards of directors. It also notes that it has submitted cost reports to VESID and OMRDD with the requisite disclosure on the loans and received no negative responses on the utilization of its monies.

Notwithstanding the apparent illegality of using Medicaid funds for an improper purpose, the prohibitions in the Education Law and misrepresentations to state oversight agencies, the Commission found that the usual formalities associated with ILC/A's "loans" did not exist. For example, there were no instruments or endorsements, no repayment term, and despite ILC/A's assertion that the loan was interest bearing no interest was accrued on the books of ILC/A. Rather, what was booked was a "due from affiliate" and a footnote on the agency's financial statements that the "loan" was non-interest bearing. Thus, ILC/A arguments that Veddersburg is independent is refuted by its own financial statements and the fact that there were common board members. Moreover, transactions between not-for-profit corporations sharing directors (if not otherwise prohibited) are not forbidden by law if the interests of each corporation are zealously safe-guarded by its own board of directors (Chelrob, 446). Clearly, the assets of ILC/A were jeopardized by this risky venture.

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highly leveraged assets would be the primary source for these refunds. As of May 1998, Veddersburg did not have sufficient assets or revenue to meet its obligation to refund entrance fees[9], was having difficulty obtaining a commercial loan for the project and had only two cottage units sold. Thus, because ILC/A would likely have to pay off old investors with money from new investors, Veddersburg's ability to create a pool of money to pay back ILC/A and residents is problematic.

2. AGENCY TRANSPORTATION SERVICES

A major core function of ILC/A is the provision of transportation to persons with disabilities. The agency receives funding to provide this service through billings to the medical assistance program for the transport of eligible clients, from VESID and OMRDD grants which allowed the agency to purchase two wheelchair accessible vans, and from VESID and OMRDD contract monies that cover the cost of coordinating transportation services and operating the agency's transportation vehicles. Thus, much of the cost of providing transportation services to the disabled community is covered by various government funding sources.

Solicitation of Donations

Despite the substantial government assistance for its transportation services, ILC/A has been also soliciting donations from many of the consumers being transported in its vehicles, in apparent violation of federal and state regulations. These solicitations which range from $6 to $150 for one round trip, have generated revenues for the agency totaling $4,174 from January 1996 to May 1997. Notwithstanding ILC/A's argument that such solicitations are needed to cover the agency's full transportation costs, the Commission believes the agency would have had ample funds to cover all of its transportation costs if funds were not being diverted to the Veddersburg retirement complex. There are also specific statutory prohibitions against demanding payment from dependent populations when the agency receives public funding for such purposes. Under 42 USC 1320a-7b(b), "whoever knowingly and willfully **solicits or receives** any remuneration... directly or indirectly, overtly or covertly, in cash or in kind... in return for purchasing, leasing, ordering or arranging for or recommending purchasing, leasing, or ordering any good, facility, service or item for which payment may be made in whole or in part under a Federal health care program, shall be guilty of a felony..."(emphasis added)[10]. Similarly, under state regulation (8 NYCCR 247.15) "the vendor providing services authorized by the agency [State Education Department] shall agree not to extract or accept payment from the handicapped person or his family for such services without prior approval of the agency."

The Commission's review found that ILC/A solicited or received payments for transportation trips in cases where it was in receipt of Medicaid revenues for the coordination or provision of the trips. In other cases, consumers had to pay for the services even though prior approval had not been received from VESID. ILC/A classified these consumer payments as donations but the Commission learned from interviews with consumers and from its examination of agency documents that, in most instances, these payments were expected as a condition for receiving continued service and that the consumers perceived such payments as a requirement. For example, the Commission found one case where ILC/A agreed to transport a consumer on

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[9] On September 15, 1997, Veddersburg's first resident paid a $40,000 entrance fee. Most of this fee ($34,000) was transferred to ILC/A on the next day to meet its operating expenses. During May 1998, Veddersburg's second resident paid a $60,000 entrance fee. This fee was used to pay outstanding bills and cover current operating costs. As of June 1998, all but approximately $900 of this fee was spent.

[10] New York State has set out this limitation on providers at 18 NYCRR 515.2(b)(8) which makes an unacceptable practice "seeking or accepting any gift, money, donation or other consideration in addition to the amount paid or payable under the program for any medical care, services or supplies for which a claim is made."

a weekly basis to a nearby hospital for $30 per trip. The agreement stated that the consumer's "donation" was considered an "outstanding balance" due the agency and a letter was written to the consumer stating that "it is now becoming to (sic) costly for us to continue without regular weekly donations, if possible" (see Attachment F).[11]

Duplicate Charges

The Commission found further, in apparent violation of 18 NYCRR 540.6(e), instances where ILC/A charged transportation services to Medicaid even though some of the cost of the service was also being paid through OMRDD or VESID funding sources. This regulation requires that any reimbursement from third parties be applied to reduce any claim from the medical assistance program. For example, during 1997, the Commission noted that transportation services were provided by an employee whose salary was fully funded through the VESID contract. The employee used his own vehicle to transport the consumer and was reimbursed for this use by ILC/A at 28 cents per mile. Although the agency reimbursed the employee at 28 cents per mile, it charged Medicaid the full rate of 85 cents per mile, which would include the cost of the driver. The Commission has identified approximately $3,141 that was funded through other sources, yet still charged to Medicaid. This mainly included the salaries of drivers which were funded through other government sources for other program purposes.[12]

Agency Vehicles

In 1995, ILC/A purchased a Ford Aerostar van to provide transportation to individuals with developmental disabilities and their families. The van was purchased for $16,037 using funds obtained through a "Capacity Building Grant" from OMRDD. One year later, ILC/A requested and received $3,000 from the Capital District Minority Regional Network (CDMRN) to make the van wheelchair accessible. ILC/A represented to CDMRN that the van would be used "to meet the demands for this specialized transportation services for the DD consumers and their loved ones."[13] The Commission, however, found that the van was rarely used to transport individuals with developmental disabilities or their families because there was virtually no demand for these services. Indeed, an analysis of all transportation services for the period January 1997 to May 1997, when agency records were available, revealed that the OMRDD-funded van was used only one time to transport individuals with developmental disabilities, albeit services were provided extensively to other ILC/A consumers. According to the grant contract, failure to meet the program objectives in the "Plan Summary" could result in termination of the contract and a return of any purchased property to OMRDD.

Thus, and as evidenced below, while ILC/A has been representing to OMRDD that it has been substantially involved in providing community-based services to developmentally disabled consumers,

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[11] ILC/A's response letter states that it did not realize that accepting donations from consumers not eligible for Medicaid would be viewed negatively and claims it needed this income to cover costs. While stating it did not solicit donations from Medicaid patients, the letter points out that some of these consumers insisted that drivers accept a "tip" which would be turned over to the finance director and recorded on the books as a donation.

[12] The response letter from ILC/A states that in those situations where an employee providing transportation was already funded by VESID the employees were "acting above and beyond their regular job responsibilities." Accordingly, ILC/A believes it did not have to use such third party income to offset it Medicaid claims. Yet, such employees carried out these duties during their normal workdays and there is no documentation to support their claims of extended workdays.

[13] In its proposal to CDMRN, ILC/A stated that there would be no charge to the consumer or family member. Yet, the Commission found that during a five-month period in 1997 the agency accepted "donations" from six consumers.

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and receiving funds for these purposes, it seems the demand is not there, possibly because of other more established service providers in Fulton and Montgomery counties.[14]

3. PROJECT LEAD

Another example of an unfulfilled promise concerns Project LEAD. From 1995 to 1997, ILC/A received $45,197 in OMRDD Family Support Service (FSS) contract funds to provide services to "unserved and underserved individuals possessing a developmental disability and/or family members of same." Yet, until October 1996, **no developmentally disabled individuals** received these services and the funds were diverted to supplement consumer services covered under annual VESID contracts.

According to the FSS contracts, Project LEAD was to provide a variety of services including: self-advocacy, training in English, information and referral, interpreter services, benefits counseling, independent living skills and transportation to persons with developmental disabilities and their family members. The contracts for 1995 and 1996 stated that approximately 375 individuals were targeted to receive services; the 1997 contract reduced the number of individuals to be served to 150. ILC/A's plan was to hire a project coordinator to provide these services.

However, instead of meeting its contractual goals to provide services to developmentally disabled persons or their families, the Commission found that Project LEAD's coordinator provided services to other consumers for whom ILC/A was already receiving funding from VESID. The Commission also found that OMRDD was aware of this failure but continued to renew the contracts. Currently, Project LEAD reportedly provides services to six individuals who meet the definition of developmentally disabled. Again, it appears that the demand for the services, for which funding was sought and provided, may not have existed.[15]

4. AGENCY COST ALLOCATIONS

A basic principle of accounting, and a requirement of the OMRDD financing system, is for not-for-profit corporations to properly allocate administrative costs among programs receiving such benefits. The Commission found problems with ILC/A's allocation of costs, which has led to its over-funding by VESID and misrepresentation of costs to OMRDD.

Even though Veddersburg benefits greatly from ILC/A, r. costs have ever been allocated to the project. As mentioned, ILC/A performs all administrative and accounting functions for Veddersburg, such as maintaining all its books and records and performing management and maintenance functions related to the Veddersburg facilities. Yet, since September 1995, none of the costs which benefit Veddersburg have been allocated to the program. Instead, ILC/A has misapplied these costs to other ILC/A programs; such as the Medicaid-funded family care program and the VESID contract.

In the case of the VESID contract, ILC/A has improperly overcharged VESID for administrative costs that should have been assigned to the retirement community or other programs. Specifically, on a quarterly

[14] ILC/A in its response agrees that the van was not utilized to serve developmentally disabled consumers as anticipated because of competition from a more established area transportation provider.

[15] ILC/A in its reply letter states that its ability to serve individuals with developmental disabilities was severely restricted because of the establishment of comparable programs by other providers. It confirms that it has had difficulty producing proof of the developmental disability status for Project LEAD participants in late 1996 and that as a result its caseload dropped dramatically. Since then, it has refocused its attention to serving developmentally disabled school age children and their families and has six such individuals enrolled under a renamed program called "Project LEAD plus."

basis, ILC/A claims costs under its VESID contract in order to draw down its next advance payment. ILC/A's budget reflects that under the VESID contract it has been claiming reimbursement for 40 percent of the agency's administrative staff. However, according to working papers prepared by ILC/A's accountant, the proper allocation of administrative costs should only be 15.8 percent for VESID and 84.2 percent for non-VESID programs. However, even these percentages are inflated, because the agency's accountant failed to consider any of the time spent by ILC/A administrative staff on Veddersburg activities. The Commission estimates that for 1995 and 1996, ILC/A overcharged the VESID contract $29,000 each year (this amount would be higher if the Vedderburg share of administrative costs was taken into account).[16]

With respect to OMRDD, the failure to allocate any administrative costs to Veddersburg has also resulted in the improper allocation of administrative costs for ILC/A's Family Care program — Project Rainbow. However, because this program is reimbursed by Medicaid based on a rate that was established by OMRDD before the Veddersburg project began, the improper allocation had no effect on the amount claimed to Medicaid. Nevertheless, a review by the Commission of that rate revealed that ILC/A is generously reimbursed by OMRDD for overseeing the family care program. ILC/A receives approximately $2,100 per month, per resident, to administer and provide program support for the agency-sponsored family care program. Of this total amount, ILC/A retains approximately $1,000 per month, per resident, to administer and for clinical support of the program, while the family care provider receives the remaining $1,100 per month to actually take care of the resident. This generous overhead rate (48 percent of total reimbursement) has allowed ILC/A to earn surpluses on the program which eventually were used in part to start-up the Veddersburg project. Indeed, when asked about the diversion of funds to Veddersburg, ILC/A's executive director emphatically insisted that the funds came from its OMRDD programs not ILC/A's VESID-funded contract.

5. PROGRAM REVIEW

Unannounced visits by Commission quality assurance staff to five of the ten family care homes sponsored by ILC/A resulted in many positive findings. The seven adult consumers who lived in these homes functioned in the profound to mild levels of mental retardation. Some had excellent communication and self-care skills; others had profound limitations in these areas and were totally dependent on their caretakers for basic activities of daily living. Universally, the seven consumers who resided in these homes were integrated into the fabric of their surrogate families; care-providers were well aware of the consumers' limitations, strengths and desires, and tended to their needs in a caring and respectful manner; records in the homes pertaining to medications, habilitation services and consumers' finances were up-to-date and complete; and, care-providers reported receiving frequent training, home visits and support from ILC/A staff.

Additionally, most homes afforded residents a clean, sanitary, and personalized environment, with one exception. Environmental conditions in this one home were substandard: a foul odor permeated common

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[16] In its response to the Commission, ILC/A states that it did not allocate time and expenses to Veddersburg, Inc. because the project had not reached "operational status." ILC/A supports this assertion by pointing out that only one of 59 planned housing units was occupied during the period under review. The Commission, however, is not disputing the operational status of Veddersburg, Inc. Regardless of whether or not the Veddersburg project was fully operational, ILC/A's failure to capture and allocate all costs related to the project violates one of the most basic principles of accounting, *separate entity*.

Under the concept of *separate entity* each financial accounting unit must be separately identified and segregated from other such units. All assets, liabilities, revenues and expenses of the separate entity are to be segregated from those of other separate accounting units. (*1996 Miller GAAS Guide*, §3.05) Clearly, Veddersburg, Inc., which is separately incorporated, qualifies for treatment as a separate entity. It is therefore the Commission's opinion that all costs, both direct and indirect, relating to the Veddersburg project should have been identified and properly charged to Veddersburg, Inc. Such costs should include salaries, equipment costs, occupancy costs and administrative overhead.

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areas, floors and counter tops were dirty, some furniture was broken or in need of replacement, and it appeared the home had a problem with insects. Of note, however, was the fact that the two consumers' private bedrooms in this house were more brightly decorated, cleaner and less malodorous than other areas.

Of the five homes visited, the one with poor conditions served the most severely disabled clients, in terms of their profound self-care limitations and behavioral difficulties. And it was clear, based on observing the care-provider greet and tend to one consumer's routine-at-home needs when she returned from day program, that the care-provider was a skillful, respectful, caring and committed surrogate mother. She just needed greater assistance and guidance in maintaining her household.[17]

6. REGULATORY IMPLICATIONS

ILC/A's participation in the joint venture to develop a multi-million dollar retirement complex, using monies entrusted to it to provide services to physically and developmentally disabled consumers, raises serious questions about how the state's regulatory agencies (i.e., OMRDD and VESID) can be more proactive in ensuring that ILC/A adhered to the mission for which it was funded.

It seems obvious that, when ILC/A's board members and its executive director initiated a project that they envisioned would produce future profits for the agency, they had no benchmarks to assess the success of such a specialized business venture. In hindsight, if ILC/A had known that the housing project would have placed its core programs at risk and public trust likely eroded because of the possible consequences of its failure, it is doubtful that it would have attempted to undertake this entrepreneurial endeavor.[18]

However, establishing Veddersburg, Inc. did not happen in a vacuum and could have been prevented through vigorous adherence to statutes already in place to prevent the misapplication of government assistance monies. Notwithstanding the fact that ILC/A submitted false cost reports to OMRDD because it failed to allocate any expenses to the Veddersburg project and the fact that the agency made verbal and written representations to VESID and/or OMRDD that no ILC/A funds would be used to support Veddersburg, both state agencies were well aware that ILC/A was setting up another corporation to develop the retirement complex, but apparently did not think there would be a problem because: (1) the corporation would be a separate one, and (2) ILC/A officials represented that no government funds would be used to develop this project.

Nevertheless, the "loans" to Veddersburg, Inc. were clearly disclosed in the financial reports which were filed annually to VESID and should have been attached to the cost reports filed annually with OMRDD. Had these statements been analyzed, VESID officials would not have approved ILC/A participation in this project, since it is VESID policy that any surplus funds of an agency must be used to enhance current programs and because of the statutory restriction against ILC's owning, operating or charging consumers rent for any residential program. Likewise, if OMRDD had been provided with information on these "loans" to Veddersburg, it would have been in a position to direct the determination of such action so that Medicaid funds were not misapplied. Intentionally misapplying funds from payments made under the Medicaid program for what might even be an otherwise legitimate purpose (i.e., the retirement complex) are prohibited under 18 USC 666(a)(1)(A). The manifest purpose of this statute is to prohibit misapplications from

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[17] ILC/A states in its letter that it is pleased that the Commission's findings with respect to the agency-sponsored family care home were generally positive. It notes that the family care home with poor conditions passed annual certification requirements, albeit extensive remodeling is underway to correct the substandard physical conditions of the home.

[18] ILC/A's letter disagrees with the Commissions statement that it had "no benchmarks to assess the success of such a specialized business venture." It claims that an extensive effort was made by ILC/A to assemble a consulting team knowledgeable in all aspects of the development of a retirement community and that much knowledge and experience was obtained to evaluate the project.

programs receiving federal funds in order to safeguard finite federal resources and to police those with control over these federal funds.

Moreover, the Commission is aware from meetings with OMRDD district office officials that they knew that services under ILC/A's FSS contract were not provided to the developmentally disabled. Yet, no actions were taken until late 1996 to rectify this situation, nor were any initiatives taken to reevaluate the need to continue this contract. OMRDD's program review of ILC/A also should have alerted the district office to the fact that there may not have been a need for the OMRDD-funded van to transport the MR/DD population.

- VESID should take the necessary steps to:

Recommendation

➢ Clarify for all Independent Living Centers (ILCs) what types of involvement in residential programs is or is not appropriate, and seek to amend the law if necessary.

VESID Response

➢ VESID believes that the law prohibiting ILCs from operating residential facilities is sufficiently clear, but nevertheless will reissue this as a reminder to other centers as to what is prohibited.

Recommendation

➢ Monitor the expenditures of the ILCs to make sure that they are consistent with the purpose for which the funds were provided.

VESID Response

➢ VESID stated that there are current procedures in place which call for the regular review of programs and expenditure reports, as well as, program site visits.

Recommendation

➢ Provide training to the Boards of Directors of all ILCs to ensure that they are aware of their fiduciary responsibilities.

VESID Response

➢ VESID will include the Board of Directors fiduciary responsibilities in the next board training session tentatively scheduled for the summer of 1998.

Recommendation

➢ Provide assistance to ensure a financially viable program of independent living services remains in the Amsterdam area, including extricating ILC/A from the Veddersburg venture.

VESID Response

➢ VESID will provide the necessary technical assistance and make efforts to separate Veddersurg from ILC/A.

Recommendation

- Recoup the expenses that ILC/A misreported on its annual contracts by failing to account for those expenses attributable to Veddersburg and as calculated to be proper by its independent accountant.

VESID Response

- VESID will seek to identify and rectify the overcharges to the VESID contracts.

Recommendation

- Ensure that ILC/A immediately return to consumers all funds received as "donations."

VESID Response

- VESID will require all "donations" be returned to consumers.

■ OMRDD should seek to:

Recommendation

- Review and revise the methodology for determining administrative reimbursement provided to agencies providing supervision of the family care program, as it appears to be providing an excessive level of funding compared to the funding provided for the services provided by the family care provider.

OMRDD Response

- OMRDD disagrees, stating that the family care rate includes a clinical component which should be considered as program-related and not administrative.

  (The Commission agrees with OMRDD's rebuttal and has modified its report concerning the level of funding for administering the family care program.)

Recommendation

- Tighten the administrative review procedures for determinations of need for services it funds through grants for family support services and the purchase or renovation of vehicles for transportation of persons with developmental disabilities.

OMRDD Response

- OMRDD agrees that more diligence was required in this instance and has been working with ILC/A on eligibility and service needs. OMRDD also will review consumer eligibility over the life of the FSS contract and determine whether any recoupments are necessary.

- OMRDD will strengthen its fiscal monitoring by reviewing certified financial reports and certified financial statements to uncover activities that might lead to fiscal instability or difficulties.

Recommendation

- Determine whether there is a demonstrable need to continue ILC/A's FSS contract. If there is no need to continue this program, the contract should be terminated.

OMRDD Response

- OMRDD supports continuing this program due to an unmet need in the area.

■ Statutory Change

- A statute similar to federal statute 18 USC 666 (a)(1)(A) should be adopted to make it a crime to knowingly convert or intentionally misapply public assistance monies.

ATTACHMENT A

NEW YORK
THE STATE OF LEARNING

THE STATE EDUCATION DEPARTMENT/THE UNIVERSITY OF THE STATE OF NEW YORK/ALBANY, NY 12234

DEPUTY COMMISSIONER FOR VOCATIONAL AND EDUCATIONAL SERVICES FOR INDIVIDUALS WITH DISABILITIES

April 15, 1998

Mr. Gary O'Brien, Acting Chairman
Commission on Quality of Care
for the Mentally Disabled
99 Washington Avenue, Suite 1002
Albany, NY 12210-2895

Dear Mr. O'Brien:

Thank you for the opportunity to comment on the Commission's draft report from the review of The Independent Living Center of Amsterdam, Inc. We have reviewed the report and have comments on the narrative explanation of findings as well as the recommendations. In addition, staff have had an opportunity to discuss the findings with investigators from your office and have provided them with additional information which we believe will impact on the findings as presented in this report.

While we do not agree completely with all aspects of the findings as they are reported, VESID is grateful for the Commission's review. The situation which has occurred regarding the entanglement between ILC/A and the Veddersburg project, related actions including the overcharges, and duplicate billings, and charging consumers for Transportation trips are very disturbing. VESID will be very diligent in taking action to resolve and rectify the inappropriate actions on the part of the Center, and we will also review VESID procedures to see how we can strengthen our oversight of non-profit service providers.

VESID is concerned that the written report appears to be directed to and highly critical of the oversight agencies (NYSED and OMRDD) rather than the Independent Living Center which is chiefly responsible for the actions and results explained in the report. Center officials were responsible for those conditions. While VESID and OMRDD are charged with oversight responsibility, we believe we were misled by ILC/A officials regarding the funding of the Veddersburg project. As such, the findings and recommendations should be directed toward ILC/A management and Board of Directors, said officials be requested to provide written explanation for these practices, and recommendations should be directed specifically toward the Center. In addition, VESID has concerns about the presentation of some of the Commission's findings in the report and requests that the findings be amended as follows.

The narrative report indicated that "VESID officials did not dissuade ILC/A from creating the subsidiary corporation to develop this housing project" and "VESID officials would not have approved ILC/A participation in this project...". VESID had questioned Center officials about the existence of the Veddersburg project particularly about the use of Center funding in supporting a residential project. On several occasions the Center Director provided assurance that the project was not funded with VESID resources and went as far as providing VESID with

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written assurance from the Center's attorney. In a letter dated April 19, 1996 (copy attached), said correspondence states that "the development of the project is not being funded in any way, shape or form by the budget of the Independent Living Center which is approved by VESID...there is no government funding of the Veddersburg project...to categorically reiterate, there is no taxpayer money used to fund the Veddersburg project."

We are concerned that the reference on page 12 will lead readers to believe that VESID had approved the Veddersburg project. However, VESID does not have authority to approve and did not approve this project. VESID believes we took prudent steps in questioning the ILC/A officials several times about the Veddersburg project and were given verbal assurances by the Executive Director and written assurances by the Center's attorney that no government funds were used. Therefore, we had no reason to investigate this further.

Regarding the review of audited financial statements, we are aware that the ILC/A was required to provide certified financial reports and audited financial statements to OMRDD and that VESID was also in receipt of the financial statements. VESID had questioned ILC/A officials on several occasions and were assured both verbally and in writing that no government funds were used in this project. However, we are examining how we can further strengthen our fiscal monitoring in those situations where we suspect fiscal instability or difficulties.

Subsequent to the release of this draft report, VESID provided the Commission's investigators a copy of the letter which assured VESID that no government funds were used. Our discussions with Commission investigators indicated that they had documented that three weeks prior to the date of the prior referenced letter from the ILC/A attorney dated 4/19/96, that Veddersburg had in fact already incurred over $35,000 in debt to the ILC/A.

As a whole, VESID is very concerned about the findings which are presented in this report and believes that Center actions are inappropriate in a number of areas as follows:

Findings:

1. **Veddersburg Village**

VESID believes that ILC/A's involvement in the Veddersburg project is improper on several grounds. First, there is no provision in ILC/A's certificate of incorporation which authorizes the Center to develop, establish and manage a retirement complex such as Veddersburg, and ILC/A therefore appears to be operating beyond its corporate authority. Furthermore, Education Law Sec. 1121(2) expressly provides that service centers for independent living shall not be operated as residential or housing facilities. While Veddersburg is a separately established corporation, the less-than-arm's length aspects of the relationship between ILC/A and Veddersburg raises legitimate concern that the Center is in violation of Sec. 1121(2). In addition, the diversion of ILC/A funds to the Veddersburg project would appear to violate Not-For-Profit Law Sec. 508, which requires that all incidental profits be applied to the maintenance, expansion or operation of the lawful activities of the corporation. As the report notes, the diversion of funds to Veddersburg has had a detrimental affect on the ILC/A's finances and has jeopardized both the Center operations and the Veddersburg project's residents. It is therefore arguable that the directors of ILC/A, in their actions taken with respect to the Veddersburg project, may have failed to safeguard the interest of the Center in breach of their duty as directors pursuant to the Not-for-Profit Corporation Law.

2. **Agency Transportation Services**

- **Solicitation of Donations** - VESID is in agreement that the solicitation of "donations" from consumers is inappropriate and is in direct violation of Section 247.15c(1) of the Regulations of the Commissioner of Education.
- **Duplicate Charges** - VESID is in agreement that duplicate billings for the same charge is inappropriate and is in violation of State law. Center officials accepting the responsibility for operating a not-for-profit center of independent living should have been aware that billing more than one State agency for the same charges is inappropriate.
- **Agency Vehicles** - VESID will defer to OMRDD on the list of agency vehicles.

3. **Project LEAD**

VESID will defer to OMRDD on this program.

4. **Agency Cost Allocations**

VESID is very concerned as to the ILC/A practice of charging the contract for the full value of budgeted personnel costs (40%) for administration and maintenance staff while CQC auditors were provided documentation that the proper allocation should be as low as 15.8% for ILC/A with a further reduction for an allocation to Veddersburg. Charges should have been allocated to Veddersburg by ILC/A. We agree that this practice is inappropriate and will seek to identify and rectify the overcharges to VESID's contract which resulted from the use of this allocation methodology.

5. **Program Review**

VESID will defer to OMRDD regarding the Commission's visits to the Family Care Program.

6. **Regulatory Implications**

VESID believes that our exploration of the extent and scope of the Veddersburg project, its relationship to the ILC/A, and our request for verbal and written assurances were satisfactory actions at that time. In hindsight, once the facts of this investigation have been revealed, it becomes clearer that additional steps would have been taken if the facts were known. However, VESID would not routinely provide vigorous oversight since the questions which were raised at that time were answered by the ILC/A assurances.

Responses to the recommendations contained in this report:

1) The law prohibiting ILCs from operating residential facilities is sufficiently clear; however, VESID will reissue this as a reminder to other Centers as to what is prohibited.
2) VESID's current procedure calls for regular review of program and expenditure reports as submitted for contract claim. Also, program monitoring site visits are made to review ILCs by VESID.
3) VESID will include the Board of Directors fiduciary responsibilities in the next board training session tentatively scheduled for summer 1998.
4) VESID will provide the necessary technical assistance to maintain a financially viable program of independent living services. This will include efforts to separate the Veddersburg venture from the provision of independent living services.
5) VESID will seek to identify and rectify the overcharges to the VESID contracts.
6) VESID will require that all "required donations" from consumers be identified by ILC/A and returned to the consumers as soon as possible.

We appreciate the opportunity to comment on this report and to meet with Commission investigators to further discuss and clarify the findings. Once the Center has been afforded the opportunity to comment on the findings, we will take every action necessary to sustain and enhance independent living services in Amsterdam.

Sincerely,

Lawrence C. Gloeckler

Attachment

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April 19, 1996

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CENTERS ADMIN.
UNIT

Mr. Robert Gumson
The University of the State of New York
The State Education Department
Vocational and Educational Services for
Individuals with Disabilities (VESID)
One Commerce Plaza, 16th Floor
Albany, NY 12234

RE: Independent Living Center of Amsterdam

Dear Mr. Gumson:

Please be advised that we are in receipt of a letter dated January 29, 1996 from Mr. Edward Januszawski addressed to the Governor's office.

We have previously corresponded in regard to Mr. Januszawski's ongoing complaints with respect to the Veddersburg project in Amsterdam.

Contrary to the assertions in the January 29, letter there has been no misappropriation of funds by the Independent Living Center. The development of the Veddersburg project is not being funded in any way, shape or form by the budget of the Independent Living Center which is approved by VESID.

We firmly believe that our elected officials would fully support the establishment of a senior housing project in Amsterdam which is not funded by state or government sources. The fact that a not-for-profit corporation is the sponsor of an organization, does not mean that the not-for-profit corporation is to be regulated or governed by the state or that the corporation is funded by the government. There is no government funding for the Veddersburg project.

To categorically reiterate, there is no taxpayer money being used to fund the Veddersburg project.

Mr. Januszawski is a disgruntled neighbor who does not want development in his neighborhood. His motivations for perpetuating the misstatements in a libelous manner as he has done, are strictly personal to prevent development in his neighborhood. There is no basis in fact or law to substantiate any of the allegations which he has made.

We are contemplating legal action against Mr. Januszawski for his repetitive conduct of perpetuating false statements in opposition to this project.

We respectfully submit that the State of New York and its elected officials should fully support a project which would assist in caring for the elderly without burdening the Medicaid budget. There is no rational explanation for opposition to this project which is paid for by the residents who will live in the project and not by the government.

I would greatly appreciate it if you would have any individual who contacts you regarding this matter referred to me so that I may discuss this matter in more detail with them.

Thank you for your courtesies in this matter.

Respectfully yours,

TOBIN AND GRIFFERTY, P.C.

Stephen J. Grifferty

SJG:gs

cc: Bonnie Page, Executive Director
Independent Living Center

ATTACHMENT B

George E. Pataki
Governor

Thomas A. Maul
Commissioner

STATE OF NEW YORK
OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES

44 HOLLAND AVENUE
ALBANY, NEW YORK 12229-0001
(518) 473-1997 • TDD (518) 474-3694

March 27, 1998

Gary D. O'Brien, Chairman
State of New York
Commission on Quality of Care
for the Mentally Disabled
99 Washington Avenue, Suite 1002
Albany, NY 12210-2895

Dear Mr. O'Brien:

Thank you for the opportunity to comment on the Commission's draft report regarding the Independent Living Center of Amsterdam, Inc.

There are three recommendations in the report directed to OMRDD. The first relates to review and revision of the methodology for determining reimbursement for administration in agency sponsored family care.

Regarding this issue, the Commission made the assumption that all funds not going directly to the family care provider should be considered cost of administration. This is not an accurate assumption. OMRDD considers the cost of clinical staff to be program related, providing in most cases direct services to consumers and consultative services to providers in the community. Given the functioning level and the program needs of the consumers being served, the cost of clinical staff, representing over 25 percent of the budget, or $91,000, is more appropriately considered a program cost, not an administrative cost (see Attachment A).

With regard to the second recommendation relating to strengthening the administrative methodologies for determining need for services, the Capital District DDSO has been working with the agency on eligibility and level of service issues. While we believe our review process is generally sound, more diligence was required in this particular situation to ensure that only persons with developmental disabilities were planned to be served by the agency in the first instance. During the contract renewal process in 1996, it became apparent to the DDSO team that the agency was not exclusively providing services to developmentally disabled consumers through Project Lead, and the agency was directed to adhere to provisions of the contract. The services of the DDSO psychologist were made available to the agency in making eligibility determinations, and the number of developmentally disabled persons served through the contract was reduced to 14 by the end of 1997 at an annual cost of

$14,372. Program goals were adjusted for the 1998 contract to reflect a new focus of services on educational and access advocacy, service coordination, and transportation for 15 developmentally disabled school age children and their families. As of February 26, 1998 there were seven consumers enrolled in the program.

I have also instructed the DDSO team to review consumer eligibility over the life of the contract, and provide a recommendation on the need for recoupments given the number of non-developmentally disabled consumers or families previously served.

The third recommendation specifically addresses the question of the need to continue ILCA's Family Support Services contract. The DDP4 data for Montgomery County display an unmet need for services provided by Project Lead, including advocacy, service coordination and transportation, which contributed to the DDSO's decision to work with the Agency to fulfill its contract goals. OMRDD supports continuation of this contract.

Regarding the issue of OMRDD funds supporting the Veddersburg Village Project, my staff have reviewed the minutes of a meeting held on August 8, 1996 between the Executive Director of ILCA and the Director and staff of the DDSO. At this meeting, the Executive Director of ILCA represented that, "no OMRDD funds have been used for this project, although non-restricted agency funds have been spent to support it." Assurances were also given that no OMRDD supplied resources would be committed to the project in the future. It should also be noted, however, that the CFRs submitted by ILCA did not disclose the related party transactions on the CFR 5 as required by the CFR manual. In addition, the annual Certified Financial Statements were not submitted to OMRDD as required. We have obtained and reviewed the IRS 990s and Annual Financial Statements filed with the Attorney General, and these reports do disclose the related party transactions cited by the Commission. It is distressing that these reports were certified by the same accounting firm. Nevertheless, OMRDD should have insisted that the Certified Financial Statements be submitted in a timely manner.

I have directed our Revenue Support office to bring the matter to the attention of ILCA and the accounting firm and request an explanation of the omission, and require that ILCA make the required filing on a timely basis in the future.

We have also strengthened our fiscal monitoring within the Revenue Support office to review the Certified Financial Reports and Certified Financial Statements of selected agencies to uncover any activities or circumstances that could potentially lead to fiscal instability or difficulties. Our revised protocol will include timely follow-up with any agency that does not submit the Certified Financial Report or Certified Financial Statement within the specified time frames. Any significant findings of fiscal irregularities will be referred to the Quality Assurance office for more detailed review.

If you have any questions relative to our response, please contact Jan Abelseth, Interim Deputy Commissioner, at (518) 474-3625.

Sincerely,

Thomas A. Maul
Commissioner

TAM:JA
cc: Dr. Abelseth

Attachment A

I.L.C.A. Family Care Price

(Effective 4/1/95)

	LINE ITEMS	COST	% of TOTAL
PROGRAM:	PROJ. ASSIST/HOME MANAGER (.5 P.A. & H.M.)	$ 25,764	
	CLINICAL (1 FTE RN)	25,339	
	FRINGE	10,118	
	PROGRAM OTPS (Staff Travel, Office Supp. Office Space, Utilities, etc.)	29,958	
	TOTAL PROGRAM	$ 91,179	25.33%
PROVIDER PAYMENTS:	Difficulty of Care	$132,600	
	D.O.C. Supplement	11,220	
	Sitter Services	28,080	
	Recreation Transportation	2,640	
	Emergency Respite	1,320	
	Provider Training	2,200	
	Other (Trial visits, non-Medicaid funded, med. costs & provider recognition)	2,200	
	TOTAL PROVIDER PAYMENTS	$180,260	50.07%
PROGRAM ADMINISTRATION:			
	F.C. Coordinator (Remaining .5 of Home Manager)	$ 12,500	
	FRINGE	2,476	
	TOTAL PROGRAM ADMIN.	$ 14,976	4.16%
AGENCY ADMINISTRATION:			
	Admin. Staff (2.17 FTE)	$ 47,450	
	FRINGE	9,400	
	Agency Adm. OTPS	16,750	
	TOTAL AGENCY ADMIN.	$ 73,600	20.44%
	TOTAL ASFC BUDGET	$300,015	100.00%
	Number of Individuals	22	
	Units	8030	
	Per Diem	$44.83	

ATTACHMENT C

NEW YORK
THE STATE OF LEARNING

THE STATE EDUCATION DEPARTMENT/THE UNIVERSITY OF THE STATE OF NEW YORK/ALBANY, NY 12234

OFFICE OF VOCATIONAL AND EDUCATIONAL SERVICES FOR INDIVIDUALS WITH DISABILITIES

Via Fax and Certified Mail/Return Receipt Requested

August 7, 1998

Ms. Audrey Bowman, President of the Board of Directors
Mr. Richard Tyler, Acting Executive Director
Independent Living Center of Amsterdam, Inc.
12 Chestnut Street
Amsterdam, New York 12010

Dear Ms. Bowman and Mr. Tyler:

We have reviewed your July 27 and August 3, 1998 responses to our request for a detailed action plan to resolve the concerns set forth in our letter of July 23, 1998 and our meeting on July 30, 1998. We have concluded that there is insufficient evidence to establish that the Center is fiscally viable and able to sustain services to consumers as required in your contract with the Office of Vocational and Educational Services for Individuals with Disabilities (VESID). Therefore, you are hereby advised that VESID will not renew its contract for Independent Living Services with Independent Living Center of Amsterdam, Inc. (ILC/A) beyond the expiration of the first period of the contract, which expires on September 30, 1998.

The contract (C005563) between ILC/A and VESID provides for termination of such contract without cause by either party by thirty (30) days prior written notice. Therefore, VESID elects to terminate the contract effective October 1, 1998. This letter shall serve as the written notice of termination, as required by Appendix A-1 of the contract.

In order that we continue uninterrupted services to current ILC/A consumers and establish alternative means of delivering independent living services for the people of Fulton and Montgomery counties, we will require your immediate and active cooperation in planning the transition of Independent Living Services to another entity effective October 1, 1998. We will establish a transition team, which will include VESID and

VESID

Office of Mental Retardation and Developmental Disabilities (OMRDD) staff members to work with ILC/A to carry out the transition.

This letter will also confirm our scheduled meeting on Wednesday, August 12, 1998 at 2:30 p.m. to begin discussion of VESID's and OMRDD's transition expectations. In addition, pursuant to Appendix A-1 of the contract, ILC/A is required to maintain and make available for inspection by VESID a complete inventory of all non-expendable assets which are purchased, improved or developed under the contract. We request that we be provided with a copy of the inventory at the August 12th meeting.

We would appreciate your continued cooperation during this transition period. If you have any questions, please call this office at (518) 486-4038.

Sincerely,

Ronald G. Calhoun

Ronald G. Calhoun
Coordinator of VR Services
and Administration

cc: Richard Mills, SED
Richard Cate, SED
Lawrence Gloeckler, VESID
Thomas Maul, OMRDD
Jan Abelseth, OMRDD
Richard Johnson, OMRDD
Helene DeSanto, OMRDD
Gary O'Brien, CQC
Robert Gumson, VESID
William Johnson, ILC/A
Nellie Orsini, ILC/A
Sharon Riska, ILC/A
June Bowman, ILC/A
Ricardo Pacheco, ILC/A
David DiCaprio, ILC/A
John Riccio, ILC/A

ATTACHMENT D

George E. Pataki
Governor

Thomas A. Maul
Commissioner

STATE OF NEW YORK
OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES
44 HOLLAND AVENUE
ALBANY, NEW YORK 12229-0001
(518) 473-1997 • TDD (518) 474-4694

Via Fax and Certified Mail/Return Receipt Requested

August 7, 1998

Ms. Audrey Bowman, President of the Board of Directors
Mr. Richard Tyler, Acting Executive Director
Independent Living Center of Amsterdam, Inc.
12 Chestnut Street
Amsterdam, NY 12010

Dear Ms. Bowman and Mr. Tyler:

We have received your revised fiscal plan which Independent Living Center of Amsterdam, Inc. ("ILCA") transmitted to OMRDD/VESID on August 4, 1998. Regrettably, the plan does not provide OMRDD with adequate demonstration that ILCA is fiscally viable. The contracts referenced below between ILCA and OMRDD provide for termination of such contracts without cause by either party by thirty (30) days prior written notice. Therefore, this letter constitutes such notice of termination of the Office of Mental Retardation and Developmental Disabilities' ("OMRDD") contracts, ## CO14440-02(Individual Support Services) and CO12492-05 (Family Support Services), with Independent Living Center of Amsterdam, Inc., effective close of business September 30, 1998. Upon receipt of this notice, ILCA is to cancel, prior to September 30, 1998, as many outstanding obligations as possible and shall not incur any new obligations after receipt of this notice without approval by OMRDD. OMRDD, of course, is responsible for payments on claims for services provided and costs incurred pursuant to the terms of those contracts.

The 7-passenger Aerostar Wagon ILCA purchased pursuant to Contract #CO13462 (the Capacity Building Grant) is the property of OMRDD. On September 30, 1998, it must be returned to OMRDD or its designee.

Effective close of business September 30, 1998, ILCA is no longer an authorized provider of OMRDD Comprehensive Medicaid Case Management Services ("CMCM"). We are terminating authorization you have under any previous correspondence, specifically approval notification to bill HCBS residential habilitation under Price ID RQF0131 and HCBS service coordination under Price ID RRP8009. Concurrently with this letter, we are notifying the New York State Department of Health of these actions so that it may take whatever action it deems appropriate with regard to your CMCM, HCBS and Transportation Medicaid Provider Agreements. Should the Department of Health decide to take any action with regard to some or all of ILCA's Medicaid Provider Agreements, it will advise ILCA directly.

BEST COPY AVAILABLE

The room and board payments to your Family Care Providers and personal allowance for the consumers in the homes will be handled directly by OMRDD effective October 1, 1998. Any SSA or SSI payments received by ILCA as Representative Payee on behalf of the family care consumers after September 30, 1998 should be returned to the Social Security Administration. ILCA will continue to receive payments for residential habilitation services until September 30, 1998, as long as the family care providers are receiving the proper amounts for residential habilitation services due them from your agency.

As indicated in my previous correspondence and as further discussed at our meeting with your Board on July 30, 1998, information has come to OMRDD's attention that Independent Living Center of Amsterdam, Inc. has continued to provide direct financial support in the form of loans as well as other administrative support to Veddersburg Village, even after your receipt of a draft report by the Commission on Quality of Care for the Mentally Disabled (CQC) highly critical of such support. Given the above circumstances and the fact that such support is no longer the policy of ILCA, you have agreed to cease and desist immediately from providing any financial assistance, in any form whatsoever, including loans, to Veddersburg Village. This prohibition applies to funds which may now be in your agency's possession or custody if they originated from OMRDD directly or from any other program source for which OMRDD has given its approval including, but not limited to SSI and State supplements, CMCM, Family Support Services, Individual Support Services, Family Care and the Medicaid Home and Community Based Services Waiver program.

OMRDD is now requesting your cooperation in effecting a transition of the services you are providing under OMRDD auspices to another provider to ensure that the needs of the families and consumers can continue to be met.

Sincerely,

Jan Abelseth
Interim Deputy Commissioner
Division of Quality Assurance

Helene DeSanto (EA)

Helene DeSanto
Interim Director
Capital District DDSO

cc: Mr. R. Johnson
Mr. Pezzolla
Ms. Hester

Mr. Picker
Mr. Jung
Ms. Lark
Mr. Kaplan
Ms. Kagan
Mr. D. Johnson
Mr. Gloeckler, VESID
Gary O'Brien, CQC
Nellie Orsini; Board Secretary
Sharon Riska, Board Treasurer
June Bowman, Board Member
William Johnson, Board Member
Ricardo Pacheco, Board Member
David DiCaprio, Board Member

ATTACHMENT E

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ENNIS C. VACCO
Attorney General

(212)416-8162

PAMELA JONES HARBOUR
Deputy Attorney General

July 31, 1998

Stephen Grifferty, Esq.
Tobin & Grifferty Drive
One Executive Centre
Albany, New York 12203

Re: Veddersburg Village

Dear Mr. Grifferty:

This will serve to confirm our phone conversation of last week wherein we discussed the outstanding issues relating to the offering plan for Veddersburg Village.

As I made clear at the time, no sales should have been consummated prior to our acceptance for filing of an effectiveness amendment to the plan. Since the plan was never declared effective, we have requested that rescission be offered to all residents who have made down payments. You have informed me that such an amendment is forthcoming.

To date, I have not received the proposed amendment. If it is not submitted immediately, this office will have to proceed with appropriate enforcement action. I look forward to hearing from you in the near future.

Very truly yours,

Marissa Piesman
Assistant Attorney General

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Division of Public Advocacy • Real Estate Financing Bureau
120 Broadway, New York, N.Y. 10271-0332 • Phone (212) 416-8100 • Fax (212) 416-8179 • Not for Service Of Papers

ATTACHMENT F

Independent Living Center of Amsterdam, Inc.
12 Chestnut Street · Amsterdam, New York 12010

May 2, 1997

[redacted]
Amsterdam, N.Y. 12010

Dear [redacted];

Attached please find a copy of the dates of service provided by ILCA for your transportation to Ellis Hospital at your request.

As you will recall, the $30.00 per trip donation was pre-agreed to by you. You will note that there is still an out-standing balance that we trust will be taken care of by you . We do understand your financial situation and therefore are doing our best to work with you, however, it is now becoming to costly for us to continue without regular weekly donations, if possible.

If you need to make arrangements other than weekly donations, feel free to contact me.

Thank you for your cooperation in this very most important matter.

16 Bernie Draper
Coordinator

cc: Indiv. file

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SERVING BOTH FULTON AND MONTGOMERY COUNTIES
Tel.: (518) 842-3561 · TDD: (518) 842-3593 · Fax: (518) 842-0905

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The Commission on Quality of Care for the Mentally Disabled is an independent agency responsible for oversight in New York State's mental hygiene system. The Commission also investigates complaints and responds to requests concerning patient/resident care and treatment which cannot be resolved with mental hygiene facilities.

The Commission's statewide toll-free number is for calls from patients/residents of mental hygiene facilities and programs, their families, and other concerned advocates.

Toll-free Number: 1-800-624-4143 (Voice/TDD)

In an effort to reduce the costs of printing, please notify the Commission if you wish your name to be deleted from our mailing list or if your address has changed. Contact:

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for the Mentally Disabled
99 Washington Avenue, Suite 1002
Albany, NY 12210-2895

Tel. (518) 473-7538

http://www.cqc.state.ny.us